No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF FORMER U.S. ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief addresses the following question:

Whether deeming four million unlawfully present aliens to be "lawfully present" and eligible for various benefits constitutes an exercise of the Executive Branch's prosecutorial discretion.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae Edwin Meese III, Richard Thornburgh, and John Ashcroft served, respectively, as the Seventy-Fifth, Seventy-Sixth, and Seventy-Ninth Attorneys General of the United States. The Attorney General "is the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed." *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). *Amici* submit this brief to assist the Court in understanding the proper contours of the Executive Branch's authority to exercise enforcement discretion, informed by the constitutional separation of powers, historical practice, and the practice of the United States Department of Justice during their tenures.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "DAPA" action under review in this appeal is formally entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citi-

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[1]Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

zens or Permanent Residents." Pet. App. 411a. That action would deem over four million unlawfully present aliens "lawfully present" and eligible for work authorization and various other benefits. As the title reflects, the Executive Branch asserts that this action is an exercise of prosecutorial or enforcement discretion. That assertion of power is not only without precedent, but also bucks more than 200 years of consistent understanding and practice recognizing that prosecutorial discretion is limited to the decision to forbear enforcement in particular cases.

DAPA is nothing like that, affording relief to a broad class of aliens based on the rote application of criteria invented by the Executive. But "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The legislature here has prescribed general rules governing immigration and naturalization, including the conferral of "lawful presence" status and work authorization. Rather than enforce those general rules, or set enforcement priorities within the sweep of those rules, DAPA attempts to rewrite them, conferring "lawful presence" status, work authorization, and eligibility for other benefits on a class of individuals to which Congress denied them.

That action finds no support in the Executive's authority to exercise prosecutorial discretion. The modern practice of prosecutorial discretion is derived

from the writ of *nolle prosequi*, which could only be entered on a case-by-case basis. Modern practice reflects its roots, maintaining the focus on the exercise of discretion with respect to particular individuals and cases. To the attorneys of the Department of Justice, the term "prosecutorial discretion" is not an empty vessel into which any asserted executive power may be poured, but instead denotes the exercise of judgment regarding the facts and circumstances of a particular case, focusing on the nature of the alleged offense and the characteristics of the individual suspect. The Executive's consistent practice in this respect over a period of centuries is compelling evidence that the Executive's authority to exercise discretion in the enforcement of the laws does not encompass the far broader power to authorize the class-wide relief that the Executive claims in this case.

Likewise, DAPA's conferral of substantial benefits to unlawfully present aliens finds no support in the Executive's enforcement-discretion authority. Such discretion is limited to the decision to prosecute or not at a particular point in time and cannot provide immunity from future enforcement, much less award benefits to which a person is not otherwise entitled.

For those reasons, DAPA is not immune from judicial review pursuant to the Administrative Procedure Act. While the law recognizes an exception from review for actions committed to an agency's discretion, that exception does not apply to the kind of generally applicable policy at issue here.

The consequences should the Court uphold the Executive's unprecedented conception of prosecutorial discretion in this case cannot be overstated. The Executive's position allows the Executive unilaterally to dispense with compliance with the law in nearly every instance, contravening over three hundred years of Anglo-American legal tradition.

Under that view, no law could prevent the Executive from acting unilaterally to: lower tax rates through deferred enforcement that nullifies any penalties incurred; provide non-recoupable entitlement benefits to persons who do not qualify for them under statute; waive workplace safety laws for preferred industries; and, more generally, use deferred action as a bargaining chip to coerce private parties to do its bidding—for example, by offering to waive application of onerous statutory requirements in exchange for carrying out the Executive's preferred policies or even contributing money to preferred causes. This amounts to the forbidden dispensation power that the Framers denied the Executive, as combining so many powers in a single branch presents the risk of tyranny. It would also involve the kind of inherently legislative action—the effective repeal of statutory requirements—that the Court found in *Clinton v. City of New York*, 524 U.S. 417, 421 (1998), triggered the requirements of the Presentment Clause.

In all of these ways, accepting DAPA as a legitimate exercise of prosecutorial discretion means accepting unbridled Executive authority to dispense

with the law and doing great violence to the constitutional separation of powers. For that reason, the Executive's position here must be rejected and the decision of the court below affirmed.

ARGUMENT

I. DAPA's Provision of Class-Wide Relief Is Not Supported by the Executive's Authority To Forbear Enforcement of the Laws in Specific Cases

A. The Executive's Power To Exercise Discretion in Prosecution Has Always Been Limited to Decisions Affecting Specific Cases

From its inception, prosecutorial discretion has always been defined as an executive privilege to be exercised on a case-by-case basis.

The modern practice of prosecutorial discretion derives from the writ of *nolle prosequi*, *see* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 Seton Hall Cir. Rev. 1, 19–21 (2010), a "record entry that the prosecutor does not care to proceed further in the particular case," Anderson's Dictionary of Law 711 (1889). *See also* Jacob's New Law Dictionary (8th ed. 1762) ("Nolle prosequi, Is used in the Law, where a Plaintiff in any Action will proceed no further,...").

Originating in sixteenth century England, *nolle prosequi* terminated an ongoing proceeding "without any inquiry by the court." Abraham S. Goldstein,

The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 12 (1981). The writ could be used by private plaintiffs and the English Attorney General alike. *See, e.g.*, *Walsh v. Bishop*, 79 Eng. Rep. 809, 809 (K.B. 1632) (plaintiff brings action for trespass of battery against two, but terminates action against one of the defendants by entering a *nolle prosequi*); *Goddard v. Smith*, 87 Eng. Rep. 1008, 1008 (Q.B. 1704) (Attorney General entering writ of *nolle prosequi*, which initial defendant later used as evidence of barratry).

Significantly, in the hands of the royal Attorney General, *nolle prosequi* served as "the exercise of a reviewing authority over the private prosecutor. He used it to intervene and dismiss charges if they were frivolous or insubstantial or might somehow interfere with a crown prosecution." Goldstein at 12. As such, entry of the writ of *nolle prosequi* was the primary means by which the Attorney General could exercise his power of prosecutorial discretion.

The writ served the same purpose in early American practice. Public prosecutors regularly used *nolle prosequi* to terminate proceedings that they had initiated. *E.g.*, *United States v. Sharp*, 27 F. Cas. 1046, 1046 (C.C.D. Pa. 1815) (district attorney entering *nolle prosequi* after indictment); *United States v. Shoemaker*, 27 F. Cas. 1067, 1067 (C.C.D. Ill. 1840) ("There can be no doubt that, before the trial is gone into, the prosecuting attorney has a right, under leave of the court, to enter a nolle prosequi on an indictment...."). In most cases, the writ was used to

address concerns about the failure of proof or failure of jurisdiction. *E.g.*, *United States v. Porter*, 27 F. Cas. 598, 599 (C.C.D. Conn. 1808) ("The district attorney rose and said he would enter a nolle prosequi" because of lack of proof.); *United States v. Gillis*, 25 F. Cas. 1322, 1322 (C.C.D.D.C. 1812) ("Mr. Jones, for the United States...as he could not prove such a motive, he would enter a nolle prosequi."). *See also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 726 (2014) ("[M]ost case dismissals pursuant to writs of nol pros seem to have been oriented towards abandoning unprovable cases, averting duplicative punishment, and avoiding acquittals or legal precedents that might undermine law-enforcement efforts.").

Yet in other instances, the writ was employed to carry out more discretionary decisions, such as when a federal prosecutor declined to proceed with prosecution of an individual who had been indicted by a grand jury. *See United States v. Hill*, 26 F. Cas. 315, 315–16 (Marshall, Circuit Justice, D. Va. 1809) (recognizing entry of writ where the prosecutor "does not think it proper to institute proceedings").

By definition, *nolle prosequi* was entered on a case-by-case basis: it was "an agreement not to proceed further *in that suit, as to the particular person, or cause of action, to which it was applied.*" *Minor v. Mechanics' Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 74 (1828) (emphasis added). It did not and could not operate as a release from liability—as another identical action could be commenced against the same

defendants on the same underlying basis—and it conferred no benefit or immunity. *See id.*

The doctrine that prosecutors may exercise discretion over whether or not to bring charges at all arose by way of analogy to *nolle prosequi*, and always in the context of case-by-case discretion. "Until the early twentieth century..., the case law on prosecutorial discretion almost always mentioned the *nolle prosequi* and the judicial deference that accompanied the procedure." Krauss, at 24. Indeed, Chief Justice Marshall, sitting as Circuit Justice, expressly equated prosecutorial discretion to enter the writ with prosecutorial discretion "to institute proceedings." *Hill*, 26 F. Cas. at 315.

Likewise, Attorney General Roger Taney, in addressing whether the President could decline forfeiture of property belonging to the Princess of Orange that had been stolen from her and transported to the United States, reasoned that "if the President may order a prosecution begun, [or] to be discontinued, it is very evident that he may forbid the commencement." Jewels of the Princess of Orange, 2 U.S. Op. Att'y Gen. 496, 497 (1832). Taney also recognized that this prerogative was available "except in so far as [the Executive's] powers may be restrained by particular acts of Congress." Jewels of the Princess of Orange, 2 U.S. Op. Att'y Gen. 482, 486 (1831). Similarly, this Court in 1868 cited *nolle prosequi* to establish that particular "[p]ublic prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district

attorney...." *The Confiscation Cases*, 74 U.S. 454, 457 (1868).

Even as the rules of pleading were relaxed and courts grounded the theory of prosecutorial discretion in constitutional separation-of-powers principles, it retained its core as a prerogative to be exercised in individual cases. Indeed, the executive branch's ability to "balanc[e]" the "permissible factors [underlying prosecutorial discretion] in individual cases" was the central basis for identifying the decision whether or not to prosecute "particular individuals" as an "executive...function." *Nader v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974). *See also Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967) (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)) (observing that "'the attorney for the United States is...an executive official of the Government and...exercises a discretion as to whether or not there shall be a prosecution *in a particular case*'") (emphasis added). *See also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (describing district attorneys as having responsibility "to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought *in appropriate cases*") (emphasis added).

B. The Executive Branch Has Long Recognized That Prosecutorial Discretion Is Limited to Decisions Affecting Specific Cases

Modern practice within the Executive Branch—the instant action under review excepted—does not depart from historical practice, maintaining its focus on the exercise of discretion with respect to particular individuals and cases. Department of Justice attorneys exercise prosecutorial discretion on a daily basis and are deeply familiar with the individualized nature of the inquiry that is to be undertaken in every case.

The parameters of that inquiry are set forth in the United States Attorneys' Manual. Its chapter on "Principles of Federal Prosecution" reprints (and slightly revises) a memorandum of the same title issued to Department attorneys in 1980 by Attorney General Benjamin Civiletti.[2]

Drawing on case law and established practice, the memorandum addresses the exercise of prosecutors' "broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas." U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.110(B) (2014). It

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[2] Because the portions of the 1980 memorandum discussed herein are identical to their counterparts in the current edition of the Manual, subsequent citations are to the Manual.

begins with the presumption that, "ordinarily, the attorney for the government should initiate or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction." *Id.* at § 9-27.220(B). That presumption may be overcome, however, in three situations: "when no substantial Federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution." *Id.*

Each of these situations is intensely case- and person-specific. Thus, determination of the federal interest in prosecution requires "weigh[ing] all relevant considerations." *Id.* at § 9-27.230(A). That includes potentially more generalized considerations like "[f]ederal law enforcement priorities" and "[t]he nature and seriousness of the offense." *Id.* But it also includes considerations that can only be undertaken on a case-by-case basis: "[t]he person's culpability in connection with the offense," "[t]he person's history with respect to criminal activity," "[t]he person's willingness to cooperate in the investigation or prosecution of others," and the "consequences if the person is convicted." *Id.* These factors are not amenable to rigid, class-wide application but require the prosecutor's considered judgment as to the individual circumstances of each case. *Id.*

The point is not that these particular factors define the constitutional scope of the Executive's authority

to forbear from enforcement of the laws, but that such authority, as exercised by federal officials every day since shortly after the Judiciary Act of 1789 established the offices of district attorney and Attorney General, remains inherently individualized at its core. At a minimum, that consistent practice provides a "historical gloss on the 'executive Power' vested in Article II of the Constitution." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). *See also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

That same view of prosecutorial discretion is reflected in the advice provided by the Department's Office of Legal Counsel. For example, it has averred that the "Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals." Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 115 (1984). Thus, "[a]lthough prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, the decision not to prosecute *an individual* may not be controlled because it is fundamental to the Executive's prerogative." *Id.* at 126 (emphasis added).

Notably, OLC has recognized that "the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies." *Id. See also* Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 264 (1984) ("The Executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive to prosecute *particular individuals*.") (emphasis added). In other words, the core of the discretionary authority exclusively reserved to the Executive is the authority to make decision in particular cases regarding particular individuals.[3]

Finally, it should not go unmentioned that OLC's institutional commitment to the longstanding principles of prosecutorial discretion carried through to at least its initial analysis of the DAPA program. Its memorandum reports that OLC's "preliminary view

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[3] By the same token, OLC has opined that litigation settlements on behalf of the United States "that irrevocably confer[] substantial administrative discretion...could...raise constitutional concerns as the other party to the settlement would not be under the executive branch's control" and so "would have the consequence of delegating to non-executive branch actors substantial administrative discretion." Authority of the United States To Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 1999 WL 1262049, at *15 (O.L.C. 1999).

was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." The Department of Homeland Security's Authority To Prioritize Removal of Certain Aliens Unlawfully Present in the United States and To Defer Removal of Others, 2014 WL 10788677, at *13 n.8 (O.L.C. 2014). Providing relief based on "specified criteria on a class-wide basis," it continued, would raise serious questions, and so "it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria." *Id.* OLC's final analysis also proceeds on the assumption that DAPA would involve "case-by-case determinations" and expressly relies on this "guarantee of individualized, case-by-case review." *Id.* at *17.

C. The Judicial Branch Has Likewise Recognized That Enforcement Discretion Is Limited to Decisions Affecting Specific Cases

This Court recognized the individualized nature of prosecutorial discretion when it held, in *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), that "judicial review of agency decisions to refuse enforcement" are generally not subject to judicial review. The decision to refuse enforcement, it explained, "shares to some

extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict," because both entail "a number of factors which are peculiarly within [the Executive's] expertise" due to their individualized and case-specific nature: "whether a violation has occurred," whether "resources are best spent on this violation or another," whether "the agency is likely to succeed if it acts," and "whether the particular enforcement action requested best fits the agency's overall policies." *Id.*

Chaney contrasts such individualized questions with matters of general policy and rules of general applicability. The challenged instance of agency inaction before it, the Court explained, did not concern an agency that "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities"—which, it recognized, would present a very different case. *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). *See also United States v. Nixon*, 418 U.S. 683, 693 (1974) (observing that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

Lower courts have drawn on that very distinction—between a rigid "general policy" of non-enforcement and discretion as to whether "particular enforcement action[s]" fit with the Executive's objectives—in determining whether to review (and uphold) executive non-enforcement action under the Administrative Procedure Act. *See, e.g.*, *Cook v.*

FDA, 733 F.3d 1, 8 (D.C. Cir. 2013) ("The 'enforcement' discretion held unreviewable in *Chaney*...was whether to recommend prosecution...[as contrasted with statute that] left the agency with no discretion to make an exception, no matter how sensible making a particular exception might be."); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (upholding "*single-shot* non-enforcement decision" and distinguishing cases involving "expressions of broad enforcement policies...abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings" because such "general statements...are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion"); *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (finding reviewable decision not to initiate rulemaking that risked amounting to an agency's "consciously and expressly adopt[ing] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," which would "turn on matters remote from the specific facts of individual cases") (quotation marks omitted); *United States v. Wenger*, No. 11-457, 2013 WL 6633964, at *7 n.4 (N.D. Ohio Dec. 17, 2013) (criticizing Department of Justice sentencing practice that "abdicates, rather than implements, prosecutorial discretion, in the sense that '*to exercise discretion*' means, as I believe

it does, to apply objective judgment on an individual, multi-factored, case-by-case basis, rather than deciding and acting reflexively on a collective, subjectively categorical basis") (emphasis in original); *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 787 (W.D. Pa. 2014) (finding that executive action on immigration "goes beyond prosecutorial discretion because...it provides for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination").

Finally, this Court has recognized that the executive enforcement authority protected from encroachment by the other branches of the federal government and by the states is that which concerns the application of the law to particular cases. Thus, *Arizona v. United States*, 132 S. Ct. 2492, 2499, 2506 (2012), concluded that an Arizona statutory provision allowing state officers to arrest removable aliens encroached on the Executive Branch's discretion to determine in individual cases which aliens are removable and whether a given alien should be removed. "By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 2506. That holding was not an open-ended grant of executive authority to rewrite immigration law, but instead rested on the understanding that enforcement entails a close look at

"[t]he *equities of an individual case*," which "may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service," and may also involve case-specific issues of international concern. *Id.* at 2499 (emphasis added).

That type of individualized judgment, *Arizona* held, is the discretionary authority that is reserved exclusively to the Executive.

D. DAPA's Provision of Class-Wide Relief Is Not an Exercise of Prosecutorial Discretion

DAPA does not involve the kind of case-by-case exercise of judgment that is the hallmark of prosecutorial discretion; to the contrary, it absolutely depends on class-wide rules of general applicability and would be completely ineffectual in achieving its stated aims if it operated in a particularized fashion. Indeed, the Executive here concedes that, far from particularized, it is a "blanket policy." Gov't Br. at 17, 69.

Under the banner of prosecutorial discretion, DAPA instructs U.S. Customs and Immigration Services to declare illegal immigrants who satisfy six criteria "lawfully present in the United States." Pet. App. 413a. An immigrant who satisfies these criteria "shall also be eligible to apply for work authorization," *id.* at 417a, and receive deferred action "for a period of three years," *id.* at 418a. Though the memorandum bandies about phrases like "case-by-case

basis" and "exercise of discretion," DAPA is designed to provide class-wide relief. In fact, DAPA can only achieve its stated aims if it provides relief to a clearly defined class of individuals.

DAPA is designed to "encourage...people to come out of the shadows, submit to background checks," and provide "biometrics" to USCIS. *Id.* at 415a, 417a. To convince individuals to divulge this information to the government, DAPA must offer assurance that they will receive deferred action in return. DAPA provides that assurance by establishing bright-line criteria for identifying who belongs to the target class. Those who check off the criteria can thereby be assured—before they visit law enforcement officers, submit to background checks, and provide biometric data—that they will not be deported.

Of the six criteria DAPA directs USCIS to use in evaluating applications, the first five can be mechanically applied to determine whether an individual belongs to the target class. These criteria include having "a son or daughter who is a U.S. citizen or lawful permanent resident," having "continuously resided in the United States since before January 1, 2010," and having "no lawful status on the date of this memorandum." *Id.* at 417a. The sixth criterion then ostensibly instructs USCIS to "exercise...discretion" in the event that unspecified "other factors" "make[] the grant of deferred action inappropriate." *Id.* Yet this criterion is deliberately vague, since any genuine exercise of discretion would

discourage people from coming forward, and thus thwart the very policy objectives DAPA seeks to achieve.

The district court's factual findings, which were upheld by the Fifth Circuit, confirm that the DAPA criteria are designed to be applied mechanically, without exercise of case-specific discretion—a point which the Executive essentially concedes at this stage. *See* Gov't Br. at 17, 69. The district court determined that DAPA "imposes specific, detailed and immediate obligations upon DHS personnel," to such an extent that "[n]othing about DAPA *genuinely* leaves the agency and its [employees] free to exercise discretion." Pet. App. 389a (second alteration in original) (quotation marks omitted). By providing USCIS personnel with a "'check the box' standardized form," DAPA ensures that all individuals who satisfy the five concrete criteria will be approved. *Id.* at 387a. *See also id.* at 386a ("[I]t is clear from the record that the only discretion [underlying DAPA] that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the criteria therein."); *id.* at 202a ("DAPA would not genuinely leave the agency and its employees free to exercise discretion.").

As further support for its finding that DAPA affords officials no genuine discretion, the district court examined the enforcement history of DAPA's predecessor, "DACA." The court found that "[n]o DACA application that has met the criteria has been denied based on an exercise of individualized discre-

tion." *Id.* at 388a. Furthermore, "only 1–6% of [DACA] applications have been denied at all, and all were denied for failure to meet the criteria..., or for fraud." *Id.* Indeed, when pressed to provide even a single example of an individual who had been "denied for reasons other than not meeting the criteria or technical errors with the form and/or filing," the government failed to do so. *Id.*

In sum, DAPA is simply and necessarily—in light of its policy goals—incompatible with the case-by-case exercise of constitutionally authorized prosecutorial discretion.

II. DAPA's Conferral of Practical Immunity and Other Benefits Is Not Supported by the Executive's Enforcement-Discretion Authority

Prosecutorial discretion implicates nothing more than the decision to prosecute or not to prosecute at a particular moment in time. DAPA, by contrast, amounts to an alteration in legal status, affecting rights and conferring positive benefits. Those things are not, and never have been, proper incidents of the exercise of prosecutorial discretion.

The Executive's decision not to prosecute can confer no rights on the individual subject to that decision. Under early American case law, the entry of a writ of *nolle prosequi* on an indictment was "no bar to a subsequent prosecution for the same offence." *United States v. Shoemaker*, 27 F. Cas. 1067, 1067 (C.C.D. Ill. 1840). That is, it was not considered to be

"in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit." *Minor v. Mechanics' Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 74 (1828). To the contrary, it was "simply...an agreement not to proceed further in that suit" for the time being. *Id. See also Deloach v. Dixon*, 7 F. Cas. 416, 417 (C.C.D. Ark. 1840) ("A discontinuance and nolle prosequi stand on the same ground; neither of them operating, like a retraxit, to discharge, release, and bar the cause of action."); *Com. v. Wheeler*, 2 Mass. 172, 174 (Mass. 1806) (Parsons, C.J.) (same).

In the same way, the modern exercise of prosecutorial discretion does not bind a prosecutor, or his successors, on a prospective basis. One illustration is *Brown v. Herbert*, No. 11-0652, 2012 WL 3580669 (D. Utah Aug. 17, 2012), a case brought by the star of the reality television show *Sister Wives* to challenge the constitutionality of Utah's anti-bigamy statute. In an attempt to moot any claim to a justiciable "case or controversy," the Utah County Attorney's office adopted "a formal non-prosecution policy" and argued that the absence of a threat of prosecution rendered the case moot. *Id.* at *2. The district court disagreed, observing that there is "no reason to believe that such a determination is anything beyond an exercise of prosecutorial discretion that could be easily reversed in the future by a successor Utah County Attorney, or by Mr. Buhman himself, if he should change his mind." *Id.* at *4.

Prosecutorial forbearance is likewise unreviewable, affecting no cognizable right subject to judicial or other process. *Chaney*, 470 U.S. at 832; *United States v. Cox*, 342 F.2d 167, 171–72 (5th Cir. 1965); *United States v. Bekric*, 785 F.3d 1244, 1247 (8th Cir. 2015) ("A prior exercise of prosecutorial discretion in Bekric's favor does not limit a future court's ability to hear evidence and draw conclusions.").

By contrast, the conferral of benefits necessarily implicates rights in a way that a decision to forbear enforcement of the law does not. This Court has recognized that "the interest of an individual in continued receipt of...benefits is a statutorily created 'property' interest protected by the Fifth Amendment," such that the Government must "provide all the process that is constitutionally due before a recipient can be deprived of that interest." *Matthews v. Eldridge*, 424 U.S. 319, 332–33 (1976) (addressing procedures required to terminate Social Security disability benefits).

DAPA confers positive benefits on a massive scale—including benefits of the kind held to establish interests subject to Due Process protections. It provides that unlawfully present aliens who meet the requisite criteria will be deemed "lawfully present in the United States," Pet. App. 413a, thereby immunizing them from the ongoing consequences of "*an ongoing violation* of United States law." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (emphasis in original). *See also United States v. Orellana*, 405 F.3d 360, 370 (5th

Cir. 2005) ("[A] temporary stay of removal does not render an otherwise illegal alien's presence lawful."). DAPA further provides that "[e]ach person who applies...pursuant to the criteria above shall...be eligible to apply for work authorization." Pet. App. 417a. DAPA likewise entitles an alien to such things as Social Security benefits, *see* 8 U.S.C. § 1611(b)(2), and the Earned Income Tax Credit, *see* 26 U.S.C. § 32(c)(1)(e); 42 U.S.C. § 405(c)(2)(B)(i)(I).

Whether or not the Executive has the lawful authority to confer such benefits on persons other than those specified by Congress, the extension of such benefits has nothing to do with any exercise of prosecutorial discretion.

III. DAPA Is Not Immune from Judicial Review Because Its Provision of Class-Wide Relief and Benefits Is Not Committed to Agency Discretion by Law

Agency action that exceeds the scope of traditional executive discretion, or exceeds the powers that may be lawfully delegated by a consenting Congress, falls squarely within the judicial-review provision of the Administrative Procedure Act, 5 U.S.C. § 701(a), which embodies a "basic presumption of judicial review" of executive agency decision-making. *Abbot Labs. v. Gardner*, 387 U.S. 136, 140 (1967). While that presumption may be rebutted by a showing that the agency action is "committed to agency discretion by law," under Section 701(a)(2), that exception applies only in the "rare circumstances where the relevant statute 'is drawn so that a court would have no

meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). This is not such a circumstance.

By definition, there is "law to apply," where a statute gives "clear and specific directives." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410–11 (1971) (quotation marks omitted). *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979) (finding that statute placing "substantive limits" on agency action did not grant it unlimited discretion).

Thus, the "rare circumstances" of unreviewability typically involve the express or necessarily implied statutory commitment of particular matters to the Executive's discretion—not agency suspension of a statute's express dictates. For instance, an agency's decision not to institute enforcement proceedings is not subject to review because a decision of that nature "'involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise,'" *Lincoln*, 508 U.S. at 191 (quoting and discussing *Chaney*, 470 U.S. at 831), but the exemption does not apply where a statute "provide[s] guidelines for exercise of [an agency's] enforcement power." *Chaney*, 470 U.S. at 834 (discussing *Dunlop v. Bachowski*, 421 U.S. 560 (1975)).

Likewise, an agency's decision to deny reconsideration of a previous ruling generally will not be second-guessed, notwithstanding an alleged "material error" in the previous ruling, because the denial of recon-

sideration is distinct from the previous ruling, and there is no "adequate standard of review" for gauging the degree of error committed. *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 282 (1987); *Lincoln*, 508 U.S. at 191 (discussing *ICC*). But, of course, the underlying decision is reviewable if it is timely appealed, as is a decision *granting* a reconsideration petition or denying reconsideration of a petition alleging new evidence of changed circumstances. *ICC*, 482 U.S. at 278–81.

For the same reasons, an agency's discretion in the "allocation of funds from a lump-sum appropriation" is regarded as committed to agency discretion because of the "complicated balancing of a number of factors which are peculiarly within its expertise," including where best to spend resources, where an agency is most likely to fulfill its statutory mandate, whether a program best fits an agency's overall policies, and whether the agency has the resources to fund the program. *Lincoln*, 508 U.S. at 193 (quotation marks omitted). The agency "is far better equipped than the courts to deal with the many variables involved." *Id.* (quotation marks omitted). But if Congress *does* place restrictions on the appropriation the exemption does not apply. *Id.*

In other words, an agency's decision to ignore statutory directives cannot be defended on the basis that Congress placed that discretion within its absolute purview. By definition, it did not.

In this case, Congress has codified explicit, substantive limits that confine agency discretion with

respect to persons unlawfully present in the United States, which of those persons may be permitted to remain, and which of those permitted to remain may receive authorization to work. Congress specified in statute the major categories of aliens that may be lawfully present. *See, e.g.*, 8 U.S.C. § 1101(a)(15) (delineating some two dozen categories of "nonimmigrant aliens," ranging from accredited ambassadors of foreign governments to victims of human trafficking); *id.* § 1101(a)(20) (defining "lawfully admitted for permanent residence," or "LPR" status). Congress also expressly permitted *conditional* and *constrained* means by which otherwise inadmissible aliens may be admitted. *E.g.*, 8 U.S.C. § 1182(d)(5)(A) (allowing the Attorney General discretion to temporarily "parole [persons] into the United States...for urgent humanitarian reasons or significant public benefit," but "*only on a case-by-case basis*") (emphasis added). And Congress expressly authorized the Secretary of Homeland Security to grant *specific* types of aliens work authorization. *See* 8 U.S.C. § 1101(i) (providing this authorization with regard to trafficking victims); *id.* § 1158(c)(1)(B) (same, for asylum seekers). In addition, Congress provided detailed criteria under which aliens may remain in the United States lawfully due to their child's citizenship. *See* 8 U.S.C. § 1151(b)(2).

DAPA departs from that detailed statutory scheme. It creates a broad new category of aliens who will be deemed "lawfully present" and who will "be eligible to apply for work authorization." Pet.

App. 413a, 417a. That category is defined by criteria of the agency's own invention, such as whether the alien has a child that is a United States citizen or LPR, and whether the alien has continuously resided in the United States since 2009. *See id.* This set of factors is not drawn from the statute, and it applies potentially to millions of unlawfully present persons. Thus, in the face of a detailed, clear, and substantive statutory scheme governing its treatment of unlawfully present persons, the Executive has created a new, programmatic treatment of a large category of persons independent of, and without reference to, governing statutory law. Interpreting the Immigration and Nationality Act to confer such unfettered authority on the Executive uncabined by any "intelligible principle" would itself raise serious constitutional issues. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

DAPA is different from the sort of policy guidance on enforcement prioritization that has always properly been exempt from judicial review. That difference is underscored by the promulgation of a separate memorandum by Secretary Johnson, also issued November 20, 2014, titled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants." That memorandum establishes three tiers of aliens, generally defined by reference to criminal and immigration history, to "provide clearer and more effective guidance in the pursuit of [immigration-enforcement] priorities." Pet. App. 421a. The Policies Memo does not purport to author-

ize any alien or class of aliens to work in the United States, nor does it deem them to be "lawfully present." The Policies Memo simply sets forth enforcement priorities and is, for that reason, unreviewable. Indeed, Respondents here do not challenge it.

But DAPA is not a mere statement of priorities. Instead, it cuts across an elaborate statutory framework that provides ample "law to apply." For that reason, it is subject to judicial review under the APA.

IV. Far from a Legitimate Exercise of Enforcement Discretion, DAPA Constitutes a Forbidden Dispensation from the Law

While the Executive Branch has been appropriately vigilant in defending the core of executive discretion from encroachment by the Legislative Branch, uncabining that discretion from its historical confines risks the opposite infirmity: aggrandizement of the Executive at the expense of the Legislature by allowing the Executive to dispense with legal duties.

"There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). That is a truism in this nation's constitutional scheme, yet the principle was not always obvious. In 1686, the King's Bench ruled "that the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was the sole judge of that necessity; that no Act of Parliament could take

away that power...." *Godden v. Hales*, 89 Eng. Rep. 1050, 1051 (K.B. 1686). The ruling ratified King James II's suspension of statutory restrictions on office-holding by Catholics and Protestant dissenters, but sparked public outrage.

The Glorious Revolution of 1688 resolved that controversy and the broader question of the suspension of the laws and the granting of dispensations. William III and Mary II replaced King James, and, as part of the constitutional settlement, they agreed to the English Bill of Rights. The first two articles forbid the monarch from exercising two powers that James II had claimed were royal prerogatives: the "power of suspending of laws or the execution of laws" and the "power of dispensing with laws or the execution of laws." An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1 W. & M., Sess. 2, c. 2 (1689).

The unconstitutionality of the dispensing and suspending powers remained a vital concern of the English on the eve of the American Revolution. In 1766, King George, facing a wheat shortage and riots, unilaterally suspended a 1670 statute that permitted the export of grain from English ports. He justified his suspension of the Embargo Act by "the urgency of necessity." Philip Hamburger, Is Administrative Law Unlawful? 70 (2014) (quotation marks omitted). Parliament was in recess, and the drastic measure was required to prevent the export of the little grain that remained in the country.

Nevertheless, when Parliament returned to session, King George's decision "was denounced as a matter of suspending or dispensing with the law—the general question being whether the Crown had a right to suspend an act of Parliament, in any case, or any pretense whatever?" *Id.* (quotation marks omitted). "The necessity of the embargo was universally allowed," yet Parliament objected that necessity "was no excuse for dispensing or suspending the laws." *Id.* (quotation marks omitted). And while Parliament eventually passed an indemnification statute, the statute began by proclaiming that the embargo "could not be justified by law." *Id.* at 72.

These events influenced constitutional development in the New World. A number of state constitutions at the time of the Founding prohibited the executive from suspending or dispensing of laws. *E.g.*, Del. Decl. of Rights and Fundamental Rules of 1776, § 7 ("That no Power of Suspending Laws, or the Execution of Laws, ought to be exercised unless by the Legislature."); Md. Const. of 1776, Decl. of Rights, § 7 ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed."); Va. Const. of 1776, Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to the their rights, and ought not to be exercised."); Mass. Const. of 1780, pt. 1, art. XX ("The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the

legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."); *id.* pt. 2 ch. VI, art. I (requiring state officials to swear "no foreign Prince, Person, Prelate, State or Potentate, hath, or ought to have, any jurisdiction, superiority, preeminence, authority, *dispensing* or other power, in any matter, civil, ecclesiastical or spiritual, within this Commonwealth") (emphasis added); N.C. Const. of 1776, Decl. of Rights, § V ("That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised."); Vt. Const. of 1786, ch. 1, art. 17 ("The power of suspending laws or the execution of laws, ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for.").

The Constitutional Convention subsequently considered a resolution to provide the President a suspension power and rejected it. 1 The Records of the Federal Convention of 1787 103–04 (Max Farrand ed., 1911). The Constitution instead enshrines the English Bill of Rights' prohibitions in the Take Care Clause, an interpretation confirmed by a number of early commentators, including some who were present at the Convention. James Wilson stated that the Clause means that the President has "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established."

2 Collected Works of James Wilson 878 (Kermit L. Hall & Mark David Hall eds., 2007).

Justice William Paterson, a New Jersey representative to the Convention, later addressed the question of whether the Constitution imparts "dispensing power to the president" while riding circuit. *United States v. Smith*, 27 F. Cas. 1192, 1229 (C.C.D.N.Y. 1806). "Far from it," he concluded, "for [the Constitution] explicitly directs that he shall 'take care that the laws be faithfully executed.'" *Id.* William Rawle wrote in his early nineteenth century commentary on the Constitution that the Take Care Clause "declares what is [the President's] duty, and it gives him no power beyond it. The Constitution, treaties, and acts of congress, are declared to be the supreme law of the land. He is bound to enforce them; if he attempts to carry his power further, he violates the Constitution." William Rawle, A View of the Constitution of the United States 149 (1829).

This Court adopted that view in *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), which concerned an asserted presidential privilege to disregard a statutory duty to pay certain sums to a contractor for the postal service. The Court explained: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613. Recognizing this authority, said the Court, "would be vesting in the President a dispens-

ing power, which has no countenance for its support in any part of the constitution." *Id.*

This understanding was also reflected in early executive and legislative practice. The first Presidents and their top aides repeatedly expressed the view that "they had only narrow, case-by-case authority to excuse violations." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 732–33 (2014) (discussing the practices and views of Presidents Washington, Adams, and Jefferson). Alexander Hamilton was particularly concerned that "relaxations" in enforcement should be made only in "special cases," and expressed the risk in even mentioning executive discretion to field officers "because I should fear an abuse." *Id.* at 735 (quotation marks omitted). To this view there was one exception: the prerogative not to enforce an unconstitutional law—which President Jefferson assumed by suspending enforcement of the Alien and Sedition Acts—but there is no indication that that prerogative was seen as supporting any broader authority to suspend law on policy grounds. *Id.* at 740–41.

This Court was presented with a related question concerning the suspension power in *Clinton v. City of New York*, 524 U.S. 417, 421 (1998), which invalidated the Line Item Veto Act. That Act, the Court explained, allowed the President unlimited discretion to "reject[] the policy judgment made by Congress and rely[] on his own policy judgment." *Id.* at 444. Although technically decided on Presentment Clause grounds, *Clinton* controls here insofar as the

power claimed to fall within the Executive's inherent enforcement discretion is functionally equivalent to a power *Clinton* held to be inherently legislative and that, in turn, triggered the presentment requirement. *Id.* at 438 ("'[R]epeal of statutes, no less than enactment, must conform with Art. I.'") (alteration in original) (quoting *INS v. Chadha*, 462 U.S. 919, 954 (1983)).

At a minimum, the claim that the Executive possesses a far broader authority to dispense with lawfully enacted statutes the constitutionality of which is not in question cannot survive *Clinton*.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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